OPINION

of the Committee on Legal Affairs

for the Committee on Economic and Monetary Affairs


Rapporteur for opinion (*): Mislav Kolakušić(*)    Associated committee – Rule 57 of the Rules of Procedure
PA_Legam
SHORT JUSTIFICATION

This Commission legislative proposal is part of a package of measures that, at the same time, supports the potential of digital finance in the context of innovation and competition, while mitigating risks. It is in line with the Commission's priorities of preparing Europe for the digital age and building an economy that will be ready to meet the challenges of the future and forms part of the wider activities carried out at European and international level with a view to strengthening cybersecurity in the area of financial services and eliminating operational risks while introducing a clear, proportionate and enabling legal framework for crypto-property service providers.

European Union must respond comprehensively to any digital risks to which financial entities are exposed, risks arising from the rapidly growing use of information and communication technology (ICT) in the provision and use of financial services. The financial sector today relies heavily on digital technologies, a dependence on digital technology products that will only become more prominent, and it is of paramount importance to ensure that their digital operations are guaranteed to be operationally resilient to ICT risks. Operational resilience is also becoming a key factor due to the growth of advanced technologies market, primarily based on the possibility for digital representations of values or rights to be electronically transmitted and stored using decentralised ledger technology or similar technology ('crypto-assets'), and services related to such assets.

The rapporteur's views

The Commission proposal would lead to a limitation in the obligations of statutory auditors and audit firms, as in the future these obligations would relate exclusively to ICT and not to a statutory auditor or audit firms procedures and organisation in general. As a result, a new point has been proposed that undoubtedly indicates that the existing obligations of audit firms remain in force, and that new ones relating to ICT are added.

Compliance with Article 6. Regulation (EU) 2021/xx [DORA] of the European Parliament and the Council is not possible due to the fact that such a Regulation is not in force and does not exist legally. Such a solution incorporating into the proposal for a directive only the text of the article referred to by the Commission is only legally possible, while at the same time achieving the purpose and objective of the European Commission's proposal, as the effects are identical to those of the Commission.

Given that the DORA Regulation is still at the proposal stage and has not been adopted by the European Parliament and Council, there is a legal problem of harmonisation of the Directives in question with the provisions of the Regulation which is not legally and effectively in force. Given that the final content and rules established by that Regulation will not be known until the entry into force of DORA, it is legally untenable to harmonise those directives with a regulation that does not exist legally and effectively at the moment.
AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive
Recital 1

Text proposed by the Commission
(1) The Union needs to adequately and comprehensively address digital risks to all financial entities stemming from an increased use of information and communication technology (ICT) in the provision and consumption of financial services.

Amendment
(1) The Union needs to adequately and comprehensively address digital risks to all financial entities stemming from an increased use of information and communication technology (ICT) in the provision and consumption of financial services, ensuring further support is provided to the potential of digital finance in terms of innovation and competition.

Amendment 2

Proposal for a directive
Recital 3

Text proposed by the Commission
(3) At Union level the requirements related to ICT risk for the financial sector are currently spread over Directives 2006/43/EC, 2009/66/EC, 2009/138/EC, 2011/61/EC, EU/2013/36, 2014/65/EU, (EU) 2015/2366, (EU) 2016/2341 of the European Parliament and of the Council and are diverse and occasionally incomplete. In some cases, ICT risk has only been implicitly addressed as part of the operational risk, whereas in others it has not been addressed at all. This should be remedied by aligning Regulation (EU) xx/20xx of the European Parliament and of the Council [DORA] and those acts. This Directive puts forward a set of amendments that appear necessary to bring legal clarity and consistency in relation to

Amendment
(3) At Union level the requirements related to ICT risk for the financial sector are currently spread over Directives 2006/43/EC, 2009/66/EC, 2009/138/EC, 2011/61/EC, EU/2013/36, 2014/65/EU, (EU) 2015/2366, (EU) 2016/2341 of the European Parliament and of the Council and are diverse and occasionally incomplete. The existing provisions are not fully harmonised and it is necessary to ensure the avoidance of over-regulation and to guarantee the adequacy of the provisions with regard to the reality in the field, which is constantly evolving. In some cases, ICT risk has only been implicitly addressed as part of the operational risk, whereas in others it has not been addressed at all. This should be
the application by financial entities that are authorised and supervised in accordance with those Directives of various digital operational resilience requirements that are necessary in the pursuit of their activities, thus guaranteeing the smooth functioning of the internal market.

remedied by aligning Regulation (EU) xx/20xx of the European Parliament and of the Council[DORA] and those acts. This Directive puts forward a set of amendments that appear necessary to bring legal clarity and consistency in relation to the application by financial entities that are authorised and supervised in accordance with those Directives of various digital operational resilience requirements that are necessary in the pursuit of their activities, thus guaranteeing the smooth functioning of the internal market.


22 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision


26 OJ L […] , […] , p. […] .

Amendment 3

Proposal for a directive
Recital 6

Text proposed by the Commission

(6) Currently, the definition of ‘financial instrument’ in Directive 2014/65/EU does not explicitly include financial instruments issued using a class of technologies which support the distributed recording of encrypted data (distributed ledger technology, “DLT”). In order to ensure that such financial instruments can be traded on the market under the current legal framework, the definition in Directive 2014/65/EU should be amended to include them.

Amendment

(6) Currently, the definition of ‘financial instrument’ in Directive 2014/65/EU does not explicitly include financial instruments issued using a class of technologies which support the distributed recording of encrypted data (distributed ledger technology, “DLT”), thus not reflecting the reality of the market. In order to ensure that such financial instruments can be traded on the market under the current legal framework, in order to avoid any potential risk due to non-regulation, the definition in Directive
Amendment 4
Proposal for a directive
Recital 7

Text proposed by the Commission

(7) In particular, in order to allow for the development of crypto-assets that would qualify as financial instruments and DLT, while preserving a high level of financial stability, market integrity, transparency and investor protection, it would be beneficial to create a temporary regime for DLT market infrastructures. This temporary legal framework should allow competent authorities to temporarily permit DLT market infrastructures to operate under an alternative set of requirements with regard to access to them compared to those otherwise applicable under the Union financial services legislation that could prevent them from developing solutions for the trading and settlement of transactions of crypto-assets that would qualify as financial instruments. This legal framework should be temporary in order to enable the European Supervisory Authorities (ESAs) and the national competent authorities to gain experience on the opportunities and specific risks created by crypto-assets traded on those infrastructures. This Directive is consequently accompanying Regulation [on a pilot regime for market infrastructures based on distributed ledger technology] by supporting this new Union regulatory framework on DLT market infrastructures with a targeted exemption from specific provisions of Union financial services legislation applying to activities and services in relation to financial instruments as defined in point (15) of Article 4(1) of Directive 2014/65/EU that would otherwise not offer the full

Amendment

(7) In particular, in order to allow for the development of crypto-assets that would qualify as financial instruments and DLT, while preserving a high level of financial stability, market integrity, transparency and investor protection, it would be beneficial to create a temporary regime for DLT market infrastructures. This temporary legal framework should allow competent authorities to temporarily permit DLT market infrastructures to operate under an alternative set of requirements with regard to access to them compared to those otherwise applicable under the Union financial services legislation that could prevent them from developing solutions for the trading and settlement of transactions of crypto-assets that would qualify as financial instruments. This legal framework should be temporary in order to enable the European Supervisory Authorities (ESAs) and the national competent authorities to gain experience on the opportunities and specific risks created by crypto-assets traded on those infrastructures. This Directive is consequently accompanying Regulation [on a pilot regime for market infrastructures based on distributed ledger technology] by supporting this new Union regulatory framework on DLT market infrastructures with a targeted exemption from specific provisions of Union financial services legislation applying to activities and services in relation to financial instruments as defined in point (15) of Article 4(1) of Directive 2014/65/EU that
flexibility required when deploying solutions in the trading and post trading stages of transactions involving crypto-assets.

would otherwise not offer the full flexibility required when deploying solutions in the trading and post trading stages of transactions involving crypto-assets.

Amendment 5
Proposal for a directive
Recital 13 a (new)

_13a_ The regulatory process should take into account the proper balance between, on the one hand, efficient management of risk limitation and, on the other hand, ensuring fair competition in terms of encouraging the development of innovation in the market and protecting all actors involved.

Amendment 6
Proposal for a directive
Article 1 – paragraph 1
Directive 2006/43/EC
Article 24a – paragraph 1 – point b

 deleted

In Article 24a(1) of Directive 2006/43/EC, point (b) is replaced by the following:

(b) a statutory auditor or an audit firm shall have sound administrative and accounting procedures, internal quality control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements in order to manage its ICT systems and tools in accordance with Article 6 of Regulation (EU) 2021/xx [DORA] of the European Parliament and of the Council*. 

* [full title] (OJ L [...], [...], p. [...]’.
Amendment 7
Proposal for a directive
Article 1 – paragraph 1
Directive 2006/43/EC
Article 24a – paragraph 1 – point b a (new)

Text proposed by the Commission

In Article 24a(1) of Directive 2006/43/EC, the following point is inserted:

(ba) a statutory auditor or an audit firm which is not a micro, small or medium-sized enterprise, except if it audits entities listed in Article 2 of Regulation (EU) 2021/xx [DORA], shall have sound administrative and accounting procedures, internal quality control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements in order to manage its ICT systems and tools in accordance with Article 6 of Regulation (EU) 2021/xx [DORA] of the European Parliament and of the Council*.

* [full title] (OJ L […], […], p. […]).’

Amendment 8
Proposal for a directive
Article 2 – paragraph 1 – point 1
Directive 2009/65/EC
Article 12 – paragraph 1 – subparagraph 2 – point a

Text proposed by the Commission

(a) has sound administrative and accounting procedures and control and safeguard arrangements for electronic data processing, including information and communication technology systems that are set up and managed in accordance with Article 6 of Regulation (EU) 2021/xx of the European Parliament and of the Council* [DORA], as well as adequate operational procedures.

Amendment

(a) has sound administrative, operational and accounting procedures and control and safeguard arrangements for electronic data processing, including information and communication technology systems that are set up and managed in accordance with Article 6 of Regulation (EU) 2021/xx of the European Parliament and of the Council* [DORA], as well as adequate operational procedures. 
internal control mechanisms including rules for personal transactions by its employees or for the holding and management of investments in financial instruments in order to invest on its own account and ensuring, at least, that each transaction involving the UCITS may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the UCITS managed by the management company are invested according to the fund rules or the instruments of incorporation and the legal provisions in force;

* [full title] (OJ L [...], […], p. […]).’;

as well as adequate internal control mechanisms including rules for personal transactions by its employees or for the holding and management of investments in financial instruments in order to invest on its own account and ensuring, at least, that each transaction involving the UCITS may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the UCITS managed by the management company are invested according to the fund rules or the instruments of incorporation and the legal provisions in force;

* [full title] (OJ L […], […], p. […]).’;
### PROCEEDURE – COMMITTEE ASKED FOR OPINION

| Committee responsible | ECON |
| Date announced in plenary | 17.12.2020 |
| Opinion by | JURI |
| Date announced in plenary | 17.12.2020 |
| Associated committees - date announced in plenary | 11.2.2021 |
| Rapporteur for the opinion | Mislav Kolakušić |
| Date appointed | 10.5.2021 |
| Discussed in committee | 27.5.2021 |
| Date adopted | 1.7.2021 |
| Result of final vote | +: 23, -: 0, 0: 2 |
| Members present for the final vote | Pascal Arimont, Manon Aubry, Gunnar Beck, Geoffroy Didier, Pascal Durand, Angel Dzhambazki, Ibán García Del Blanco, Jean-Paul Garraud, Esteban González Pons, Mislav Kolakušić, Sergey Lagodinsky, Gilles Lebreton, Karen Melchior, Jiří Pospíšil, Franco Roberti, Marcos Ros Sempere, Stéphane Séjourné, Raffaele Stancanelli, Marie Toussaint, Axel Voss, Marion Walsmann, Tiemo Wölken, Lara Wolters, Javier Zarzalejos |
| Substitutes present for the final vote | Magdalena Adamowicz, Caterina Chinnici, Heidi Hautala, Emmanuel Maurel, Emil Radev, Yana Toom |
### FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>23</strong></td>
<td><strong>+</strong></td>
<td></td>
</tr>
<tr>
<td>PPE</td>
<td>Pascal Arimont, Geoffroy Didier, Esteban González Pons, Jiří Pospíšil, Axel Voss, Marion Walsmann, Javier Zarzalejos</td>
<td></td>
</tr>
<tr>
<td>S&amp;D</td>
<td>Ibán García Del Blanco, Franco Roberti, Marcos Ros Sempere, Tiemo Wölken, Lara Wolters</td>
<td></td>
</tr>
<tr>
<td>Renew</td>
<td>Pascal Durand, Karen Melchior, Stéphane Séjourné, Yana Toom</td>
<td></td>
</tr>
<tr>
<td>ID</td>
<td>Jean-Paul Garraud, Gilles Lebreton</td>
<td></td>
</tr>
<tr>
<td>Verts/ALE</td>
<td>Heidi Hautala, Marie Toussaint</td>
<td></td>
</tr>
<tr>
<td>ECR</td>
<td>Angel Dzhambazki, Raffaele Stancaelli</td>
<td></td>
</tr>
<tr>
<td>The Left</td>
<td>Emmanuel Maurel</td>
<td></td>
</tr>
<tr>
<td><strong>0</strong></td>
<td><strong>-</strong></td>
<td></td>
</tr>
<tr>
<td><strong>2</strong></td>
<td><strong>0</strong></td>
<td></td>
</tr>
<tr>
<td>ID</td>
<td>Gunnar Beck</td>
<td></td>
</tr>
<tr>
<td>NI</td>
<td>Mislav Kolakušić</td>
<td></td>
</tr>
</tbody>
</table>

**Key to symbols:**
- + : in favour
- - : against
- 0 : abstention